Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Number 76-1609

STATE OF INDIANA,
Petitioner,

- vs -

SCOTTSDALE MALL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SCOTTSDALE MALL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy thereof is attached hereto as AppendixA.

The prior opinion of the United States District Court for the Southern District of Indiana is reported at 418 F. Supp. 296 and is also attached hereto as Appendix B.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was issued and entered on February 16, 1977. No Petition for Rehearing was filed with the Court of Appeals.

The basis for jurisdiction of this Court is found in 28 U.S.C. § 1254.

QUESTION PRESENTED FOR REVIEW

Whether a State which had initially programmed a highway construction program for federal financial aid as part of the Federal-aid primary system but had withdrawn the request for federal funding and refunded any money received, all prior to the taking of any action significantly affecting the quality of the human environment, must meet the requirement of the preparation of an environmental impact statement satisfying all requirements of federal statute and regulations.

STATUTES INVOLVED

The statutes required to be considered in this matter are many and lengthy, involving both the requirement of an environmental impact statement for major federal actions and also the nature of the Federal-aid system of highway construction. Those statutes are therefore set forth as Appendix C hereto. The statutes included are 42 U.S.C. § 4332 and 23 U.S.C. §§ 103, 105, 106, 109, 110, 120 and 145 in relevant parts.

STATEMENT OF THE CASE

More than twenty years ago the State of Indiana initiated a study leading to the construction of a limited access highway bypassing the South Bend-Elkhart metropolitan area in northern Indiana. Such highway would go south of the urban area from a point on Highway U.S. 20 west of South Bend to a point on Highway U.S. 20 east of Elkhart. The first portion, from the western terminus of the proposed bypass to Highway U.S. 31 south of South Bend (the West Leg), was constructed with federal assistance and was completed in 1967. The remainder of the project (the East Leg) was divided into three projects for administrative purposes. The first extended from U.S. 31 to State Road 331. The location of that segment and the other two segments was determined in 1967.

In 1968, respondent Scottsdale Mall, an Ohio limited partnership, bought property within the planned highway corridor and constructed a shopping center in such a manner that construction of the highway as planned would eliminate 599 parking spaces from the shopping center and prevent expansion of the shopping center. Scottsdale Mall knew of the highway location plans at the time it acquired the property.

In 1970, the federal environmental protection statutes took effect. One provision, 42 U.S.C. § 4332, requires all agencies of the federal government to prepare an environmental impact statement (EIS) as to any major federal action significantly affecting the quality of the human environment.

Thereafter, the State withdrew its request for federal participation in the first segment but continued to program

money to other projects which had been eligible for federal funding but for which there had not been federal money available.

The District Court later dissolved the preliminary injunction and entered judgment for the State. Scottsdale Mall appealed to the United States Court of Appeals for the Seventh Circuit, which on February 16, 1977, vacated the judgment of the District Court and remanded the action, ruling that an EIS would be required.

the remaining two segments for federal funding. As part of such programming, the State prepared an EIS as to those two segments. The federal government later changed its requirements, indicated that State Road 331 was not a natural terminus for the project and demanded a supplemental EIS for the first segment of the East Leg, which segment was proceeding without federal participation. That supplemental EIS was approved by the Council on Environmental Quality, but was later found by the District Court to have been procedurally faulty in that it was not circulated to the public for comment.

When the State began land acquisition for the first segment.[1] (the remaining segments not being advanced to that stage,) Scottsdale Mall sued the State[2] and the federal government, pursuant to 28 U.S.C. §§ 1331 and 1332, to enjoin further action as to any part of the East Leg because of the improper EIS. On January 20, 1975, the District Court entered a preliminary injunction as requested by Scottsdale Mall. The federal government then withdrew its approval of the EIS and was thereupon dismissed from the action. Preparation of a new EIS at that point would have delayed the project for at least a year. Thereafter, the State withdrew the request for federal funding of any part of the East Leg and made an accounting transfer of $162,000.00 in federal funds received for preliminary engineering studies as to the East Leg and applied such

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[1] The record shows such acquisition to have involved only State funding. Statements in the opinion of the Court of Appeals that federal funds were used for land acquisition for the East Leg are erroneous.

[2] Named defendants below included the State as an entity and also the Indiana State Highway Commission and its members. All of such parties are considered to be included within the designation "State of Indiana" for purposes of this Petition.

ARGUMENT

This case presents important questions of statutory construction and federalism in regard to the nature of the program of federal aid for state highway construction and to the relationship between that system and the National Environmental Protection Act. This Court has not yet considered these questions, which are of vital interest to the State of Indiana and to the other states.

The requirement of environmental law relevant here is the requirement that, as to any major federal action significantly affecting the quality of the human environment, the federal agency involved must prepare an involved statement of the effect of such action on the environment and of alternatives available. 42 U.S.C. § 4332. It is emphasized that the terms of this statute place certain limits on its applicability. It applies only to the federal government and not directly to the states. Any attempt to make it totally applicable to the states and to state action would raise very serious constitutional questions as to our federal system of government. See *National League of Cities v. Usery*, —— U.S. ——, 96 S. Ct. 2465 (1976).

It is in the nature of our system of cooperative federalism that state governments will be deeply involved in many federal programs, in which it will be more reasonable for the state officials involved to be the ones to do the actual preparation of the EIS. Such involvement, however, does not affect the basic requirement that the EIS is that of the federal agency. Indeed, the statute was amended in 1975 to expressly recognize that ongoing practice, but emphasized that the federal agency retained the full responsibility. 42 U.S.C. § 4332(d).

Major federal actions to which the EIS requirement applies will frequently involve interaction with states or private parties in a number of contexts. In the federal-state areas, many such interactions will involve federal financing of state action. In other areas of major federal action, the nature of the interaction may include control over the rates which private rail carriers may charge their customers, *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975), or leases for mineral development on federal lands, *Kleppe v. Sierra Club*, —— U.S. ——, 96 S.Ct. 2718 (1976). One major federal action to which the EIS requirement has been held for other reasons not to apply is the approval of a statement of record and property report required for interstate land sales. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma*, —— U.S. ——, 96 S.Ct. 2430 (1976). The nature of the interactions vary in that in some of the above situations the involvement of the federal government is indispensible. Rates charged by railroads in interstate commerce must be approved by the Interstate Commerce Commission; the federal government as landowner must consent to any lease of its property. But in other cases, the involvement of the federal government is not indispensible to the same degree. In the *Flint Ridge* case, for example, federal approval was required only if sales were to be made across state lines. It was noted "that even absent federal approval the project could go ahead so long as the lots were not sold in interstate commerce." 96 S.Ct. at 2436, fn. 7.

It is the first contention of the State of Indiana that there is no indispensible federal involvement in the construction of primary highways. Not all highways need be constructed with federal aid. Indeed, many highway construction projects are completed by the State of Indiana without federal assistance. It is submitted that as regards

the Federal-aid primary highway system, the major federal action is *not* the *construction* of the highway, but the *financing* of the highway in part with federal funds.

The nature of the Federal-aid primary system is set forth in 23 U.S.C. § 103(b), which is included in Appendix C hereto. In 1921, the primary highway system may have involved a discrete system of highways as to which there was a significant federal interest. But the constant expansion of that system through the years, as provided for in that statute, has created a system which has since been recognized by amendment of the statute as such main roads as may be designated by the State. 23 U.S.C. § 103(b)(2). By way of contrast, the Interstate system involves a more direct federal interest.

> "It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities and industrial centers, to serve the national defense . . ." 23 U.S.C. § 103(e)(1).

That not all federally financed highway construction involves an immediate vital federal interest is shown by the Federal-aid secondary system, which may include such items of purely local interest as rural mail routes and public school bus routes. 23 U.S.C. § 103(c)(1).

Litigation of this case in the District Court involved two stages. At the time of the first stage, involving a preliminary injunction, construction of a part of the remaining sections of the bypass was programmed for federal financial support. (The portion involving Scottsdale Mall had already been withdrawn from federal participation, but had been considered in a supplement to the EIS covering other portions because of requirements that the EIS consider all sections of the highway, whether included in the specific project or not, within logical termini.) At that

point, the District Court found a procedural error in the EIS. As to substance, the EIS had been approved under the standards in effect at the time of its submission.[3] It would, however, be necessary to begin afresh on a totally new EIS, a process which would take at least a year.

The alternatives facing the State of Indiana at that point were either to delay the needed projects for at least a year while maintaining the option of using federal funds for construction, assuming that there would be federal funds not otherwise needed at the future time,[4] or to withdraw from the federal program and proceed immediately with solely state funds. The State of Indiana understandably chose the second option. It should be emphasized that the State's motive was not to ignore environmental concerns or to accomplish results that would be harmful to the environment. There was no reason to believe that a new EIS would not be approved. The motive, rather, was to avoid further delay.

The State of Indiana contends that this option was properly open to them for the reasons above stated that the EIS requirement does not apply to the State of Indiana as such and that the only significant interest of the federal government in the projects is the use of federal funding. The only proper remedy, therefore, is the denial of federal

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[3] A major underlying problem in this case has been that the guidelines concerning the EIS were in a state of constant flux during the period that the State of Indiana was preparing plans for the East Leg of the bypass. As soon as the State was in a position to fulfill the requirements, those requirements were changed.

[4] During this period, there were ordinarily more state funds available than federal funds, so that some projects would be expected to proceed with solely state financing in any event.

funding and the refund (either directly or by transfer of the federal funds to a different project) of federal monies already donated. Indeed, as noted by the District Court, (p. A-26) the State's noncompliance with federal law by not providing a proper EIS has already precluded federal funding. 23 C.F.R. § 771.5(e).

It is noted at this point that the Court of Appeals has ruled that an EIS is required before work on the bypass can continue. But the State of Indiana has no authority to prepare or submit an EIS. The statute, 42 U.S.C. § 4332, specifically provides that the EIS is the responsibility of the *federal* agency. Even if a state agency in fact does the work of preparation, the EIS is that of the federal Department of Transportation. But D.O.T. has accepted the withdrawal of the request for funding and probably would deny funding at this time in any event. Thus, D.O.T. has no interest in the bypass project which would cause it to present an EIS for consideration and approval. Further, D.O.T. was dismissed from this litigation at an earlier stage of the proceeding, and so it is not within the jurisdiction of the District Court to order the D.O.T. to take any action.[5] Thus, the Court of Appeals has created an impossible situation.

The position of the State of Indiana would appear to be strengthened by an express recognition by Congress in 1973 that:

[5] It would seem from the ruling of the Court of Appeals that the State of Indiana would also be required to accept federal funds for the bypass and that the federal government would therefore presumably be required to provide those federal funds. The alternative is a holding that the procedural error of not circulating the EIS forever precludes that State of Indiana from constructing a bypass around the South Bend-Elkhart metropolitan area.

> "The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program." 23 U.S.C. § 145.

That provision, it should be noted, was enacted later in time than the National Environmental Protection Act or the provisions of 23 U.S.C. § 109 dealing with environmental effects as a required consideration in the federal assistance highway program. Section 145 makes it quite clear that the construction projects are state activity while the federal involvement is that of assistance in funding.

It is thus the first contention of the State of Indiana that the highway itself can never become a major federal project, but that only the funds received as federal assistance are the federal involvement, so that the only proper relief in the event of a violation of the EIS requirements is an injunction against federal funding of the project. In the alternative, the second contention of the State of Indiana is that, if the construction of a highway can ever become itself a major federal project, it does not do so until a point which was not reached in this case in any segment of the East Leg while that segment was programmed for federal assistance.

There are 238 steps to be taken on a highway project before it is complete. Not all of these steps are of equal significance, however; most involve preliminary planning and engineering stages. These involve such things as general location studies, final location determination, design stage and preliminary engineering. The State of Indiana

submits that the actions which would make a project a major federal action for purposes of environmental law are those actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332. That statutory language would appear to set the line at which the act is necessarily applicable as being at the stage where the actions have an actual effect. That point would be, in a highway project, when land acquisition begins, resulting in the dislocation of persons from homes and businesses and resultant demolition of structures. The primary stage having effect on the environment is, of course, the construction itself. It might also be noted that these few stages near the end of the total process also account for the vast bulk of the cost of the project. While it is necessary, in order to avoid unnecessary waste, to have the environmental studies made as early in the total process as possible, the time the planning is done is not the same as the time crucial to the purposes of the act. Any waste of time and blueprint paper caused by erroneous design and engineering would not reasonably be considered to be a major action significantly affecting the quality of the human environment.

In terms of the Federal-aid highway programs, the crucial point is that the approval by the federal government of "plans, specifications and estimates" (P,S&E). This stage, which follows the preliminary engineering but precedes land acquisition, is the point at which there arises "a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a).

That point was held by the District Court to be the point at which a highway project becomes a major federal project as to which a state is bound by the requirements

of the National Environmental Protection Act. That same result has been reached by other United States Courts of Appeals. *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2 Cir. 1972); *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5 Cir. 1973). While the Court of Appeals in this case declined to specifically hold at what point a project becomes irrevocably federal, it would appear to support the view that such result is reached at the location stage. If there is any holding of the Court of Appeals in this case, such holding creates a conflict among the circuits which this Court should resolve.

Until the time of P,S&E, any programming of a project for possible federal participation merely creates in the State an *option* to proceed with federal funding if further requirements are fulfilled, if P,S&E approval is granted, and if federal funds are available. Federal requirements may be changed from time to time. Even if those changes in requirement do not mean changes in the highway location or design, they certainly may create delay which would necessitate balancing the desirability of federal money against the urgency of the need for the particular project. The future availability of federal money may also be questionable. During the period in question here the State of Indiana had more state money available than federal money for construction projects, so that a number of projects were done without federal participation. It is again noted that a highway project is not a short-term project; the bypass project involved in this case has been in process for more than twenty years. The requirement of an irrevocable determination as to federal participation years before construction can be expected to begin would place an unreasonable burden on the states. Nor can environmental considerations be a justification for requiring such a burdensome choice when that choice would be

made years before there could be any major federal action significantly affecting the quality of the environment. Until land acquisition[6] and construction are ready to proceed, any action is *de minimus* rather than major, is state rather than federal, and does not significantly affect the quality of the human environment.

CONCLUSION

For the foregoing reasons, petitioner, State of Indiana, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in these proceedings on the 16th day of February, 1977.

Respectfully submitted,

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[6] As noted several times above, the only land acquisition as to the East Leg of the bypass involved the first segment after that segment had been withdrawn from consideration for federal funding. Such land acquisition was with state money only. As specifically found by the District Court, the only federal money involved was for preliminary engineering.

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 76-1632

SCOTTSDALE MALL,

Plaintiff-Appellant

v.

STATE OF INDIANA, INDIANA STATE HIGHWAY COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP-74-688-C—**James E. Noland,** *Judge.*

Argued December 9, 1976—Decided February 16, 1977

Before PELL and BAUER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* Defendants-Appellees State of Indiana and The Indiana State Highway Commission withdrew a state highway project from a

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

federal-aid highway program (23 U.S.C. § 101 *et seq.*), and claim a right to proceed with state funds in the final stages and construction of the project. By electing to withdraw the project from federal funding consideration, defendants have avoided compliance with the environmental impact statement requirements which are made necessary for major federal actions" by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* We are called upon to determine whether the project in this case is a "major federal action," and whether the state may avoid the requirements of NEPA by withdrawing the project from federal programming.

Plaintiff, an Ohio partnership, owns a shopping center through which defendants were about to construct a highway. The district court granted a preliminary injunction against defendants on the ground that there had been no compliance with federal environmental statutes. Following a trial on the merits, the district court dissolved the preliminary injunction and entered judgment in favor of defendants. We vacate that judgment and remand.

The facts are not in dispute. The project which is the focal point of the controversy in this case is a proposed development of a 28-mile-long by-pass around the South Bend-Elkhart metropolitan area in Northern Indiana. As the result of a study initiated more than twenty years ago by defendant Highway Commission, a four-lane limited access highway was conceived to alleviate traffic congestion along Highway U.S. 20, which runs generally in an east-west direction through the center of the South Bend-Elkhart metropolitan area. The western terminus of the by-pass exists at a point on U.S. 20 west of South Bend; the eastern terminus is to be located at a point east of the City of Elkhart.

The by-pass project was programmed to be constructed as a federal project in four segments. One segment, from the western terminus on U.S. 20 to a point on U.S. 31 south of the City of South Bend, already has been constructed with an expenditure of approximately 6.7 million dollars in federal funds. This segment appears to occupy roughly one-fourth of the total mileage of the project. The remainder of the project, approximately 20 miles in length, was planned to be constructed as a federally funded program in three segments since 1966 or 1967. The First Segment was planned to run due east from the eastern terminus of the segment which had already been constructed to a point on State Road 331, a distance of 3.8 miles. It is the construction of this First Segment which gives rise to the controversy in this case.

In 1968 plaintiff purchased the site of the present Scottsdale Mall, a shopping center complex in South Bend. The district court found that, as presently planned, the 3.8 mile First Segment of the by-pass would bisect plaintiff's property, which is located near the western terminus of the proposed First Segment. Construction of the segment would permanently remove 599 parking spaces from the center, and would render inoperative the expansion potential which is part of the inherent design of the shopping center. As the district court further found, the location for the corridor of the First Segment as well as the remaining segments was established in 1967 after considerable discussion regarding the general location of the proposed by-pass. At the time of acquiring the site of the shopping

center, plaintiff knew that the by-pass corridor would bisect its property.[1]

On December 5, 1974, the Highway Commission advised the plaintiff that it intended to proceed with the First Segment as originally proposed. As of that date, substantial steps had been taken under the Federal-Aid Highway Act to construct the remaining segments with the assistance of federal funds. Plaintiff then instituted this action, seeking to enjoin the State of Indiana and its Highway Commission from proceeding with the plans to construct the First Segment on the grounds that the selection of the route as proposed by the State of Indiana was arbitrary and capricious, and that the State had not filed an Environmental Impact Statement (EIS) as required by federal law. The district court granted the preliminary injunction on January 20, 1975. The defendants then decided to construct the First Segment and remaining segments without federal assistance and took steps to "de-program" this project from further federal consideration.[2]

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[1] In 1972, plaintiff acquired a 20-acre parcel of land adjacent to the shopping center for purposes of expanding the facility. On June 11, 1974, plaintiff offered to transfer this parcel with appropriate waivers to defendants if defendants would agree to relocate the center line of the First Segment on the 20-acre tract. Plaintiff asserted that the acquisition costs of its property under the original design of the First Segment would be $22.4 million, while use of the 20-acre tract would result in a gift to the defendants of land valued by plaintiff at $600,000. Defendants rejected this offer. One of the grounds urged for the injunction below was that the defendant Highway Commission acted arbitrarily and capriciously in refusing plaintiff's offer. The district court found otherwise. No issue is raised in this appeal with respect to that finding.

[2] As a result of this decision, the U.S. Department of Transportation and its Secretary, originally named as defendants, were dismissed.

Our review of the record reveals a project with an extensive history of federal-state involvement. Since as early as 1966, the three remaining segments of the by-pass were scheduled, programmed, and worked upon as a federal project. The project went through the programming stage in accordance with 23 U.S.C. § 105 and regulations promulgated thereunder. Location hearings were conducted as required by federal law. In accordance with the Federal Highway Administration's Policy and Procedure Memorandum 20-8 of 1969, the Highway Commission published a notice indicating that the Department of Transportation had approved the design plans for the First Segment. Between August, 1971, and February, 1975, defendants received $162,000. in federal money for purposes of completing preliminary engineering studies of the project.[3] The record shows that the preliminary engineering stage was virtually completed, and that the state was about to commence right of way acquisition with federal funds when the plaintiff instituted this action.

In 1973, the Highway Commission requested authority to proceed with land acquisition for the First Segment. When the federal authorities advised that an EIS was required, the Highway Commission advised the Department of Transportation that it intended to withdraw its application for federal funding of the First Segment. The Department of Transportation then informed the Highway Commission that all three remaining segments were, for EIS purposes, considered one project, and that, even though the state had withdrawn its application for federal funds as to the First Segment, an EIS would be required

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[3] On oral argument, counsel for plaintiff indicated that the total amount spent was $265,000.00. Counsel for defendants asserted a figure of $162,000. The district court found that $162,000.00 had been received by defendants. Our review of the record supports the finding of the district court.

for all remaining segments of the by-pass. Indiana's compliance with this requirement and the Department of Transportation's actions with respect thereto are less than exemplary. The State submitted a final EIS for approval to the Secretary of the Department of Transportation for the remaining two segments. The State then supplemented that EIS with an EIS as to the First Segment. Although the supplement was procedurally[4] and may have been substantively deficient, the Secretary approved the submission. When plaintiff questioned the adequacy of the EIS, the Secretary, in January, 1975, responded by withdrawing its approval of the EIS and requiring another single EIS to be prepared for all three remaining segments of the by-pass.

In early 1975, approximately 185 million dollars were made available to finance Indiana highway projects. All of these funds had to be committed to specific projects by July 1, 1975. By that date, Indiana had committed all of the federal funds to projects other than the by-pass, and shortly thereafter took steps to "de-program" the remaining two segments of the by-pass from federal funding consideration. The State indicated on brief and during oral argument that the federal monies previously received for preliminary engineering study were "refunded" to the federal government. We note that the net amount of funds received by Indiana was not reduced by the "refund". In fact, the record indicates that Indiana made an account-

[4] The EIS as to the First Segment was never circulated to the public for comment as required by 42 U.S.C. § 4332 (C) and 23 CFR § 771.12(c).

ing transfer of the money, apply the amounts received for the by-pass to other projects.[5]

The district court concluded that since the Highway Commission had failed to obtain an EIS at the location stage as required by 23 CFR § 771.5 (b),[6] its eligibility for federal funding was foreclosed—a course of action reserved to each state by right under 23 U. S. C. § 145. That statute provides:

> The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the State to determine which projects shall

[5] Such accounting transfer of federal funds from one state project to another under the guise of "refund" have been viewed with disfavor. See: *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974); *Named Ind. Mem. of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971).

[6] 23 C. F. R. § 771.5 (b) provides: "In the development of the highway section, . . . the EIS . . . shall be completed during the location stage, prior to the selection of a particular location; except for those highway sections to which this part applies that had received location approval prior to the effective date of this part." Although location approval of the bypass preceded the effective date of this regulation, and thus the project apparently falls within the exception, we interpret the district court's finding to mean that since no EIS was completed as required, the project was not eligible for federal funds. The exception does not mean that no EIS is required if the project had progressed beyond the location stage prior to the effective date of the regulation. 40 C. F. R. § 1500.13 requires the preparation of an EIS for major federal actions initiated prior to the effective date of NEPA (January 1, 1970). Furthermore, an EIS must be prepared for those highway projects for which Plans, Specifications, and Estimates Approval (P,S&E Approval) had not been given by the Secretary prior to January 1, 1970. *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 699 (1972). See also *San Antonio, supra*, 446 F.2d at 1025. In this case we are advised that Indiana's next step in seeking federal funding for the by-pass was to acquire P,S&E Approval from the Secretary.

be federally financed. The provisions of this chapter provide for a federally assisted State program.

We do not view 23 U. S. C. § 145 as granting to a state the prerogative to avoid compliance with NEPA. Rather, in view of the cogent policy statements of Congress with respect to environmental considerations as expressed in NEPA, we see § 145 as a general recognition by Congress of each state's sovereign right to choose which of its many transportation construction projects shall be programmed for Federal-Aid Highway Act (FHWA) assistance. As the last sentence of the quoted statute points out, FHWA provides for a federal assisted state program, and the fact that federal funds are authorized by Congress through appropriation or the fact that those funds are made available for expenditure does not infringe on the right of a state to select a project to be financed solely out of its own funds. Section 145, however, does not give the state the right to avoid the requirements of NEPA.

The legislative history of FHWA of 1973 is tortured, reflecting considerable controversy in Congress on the issue of whether Highway Trust Fund Appropriations should be used for further construction of highways, or should be used to construct public transportation facilities. A compromise was reached in conference between both Houses. It appears to us that enactment of the FHWA of 1973, and specifically Section 123 (a) thereof (23 U.S.C. § 145), was a reaffirmance by Congress of the cooperative federal-state character of projects programmed and undertaken pursuant to the Act [see: 119 *Cong. Rec.* 28099-28100 (1973) (remarks of Congressman Anderson)]. We do not interpret 23 U. S. C. § 145 as statutory authority whereby a state may take substantial steps over a period of years to program a project for federal assistance, and then withdraw the program from federal funding consideration with a resulting avoidance of complying with federal environmental statutes.

The point at which a state highway project becomes a major federal action for purposes of NEPA has been considered by other courts. Some courts have indicated that the EIS requirements for NEPA become applicable to a federally funded highway project at least at the stage of location approval. *Indiana Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Morningside-Lenox Park Association v. Volpe*, 334 F. Supp. 132 (N.D. Ga. 1971); *LaRaza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971); *aff'd.* 488 F.2d 559 (9th Cir. 1973).[7] In *Named Individual Members of the San Antonio Conversation Society v. Texas Highway Dept.*, 446 F.2d 1013, 1027 (5th Cir. 1971), the court found that a state highway project became a federal highway project when the Secretary of Transportation authorized federal participation in the project.

In determining that Indiana had properly withdrawn the by-pass project from federal funding such that the project no longer could be considered a "major federal action" requiring an EIS, the district court noted: "[Highway Commission's] decision not to comply with the eligibility procedures necessary to maintain [its] option to receive federal highway funds cannot have the paradoxical effect

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[7] Although the *LaRaza* cases, *supra*, held that a state highway project became a federal-aid project on the date it received location approval for purposes of the applicability of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. Sections 4622-4655, and did not consider the applicability of NEPA [see: *City of Highland Park v. Train*, 519 F.2d 681, 695 (7th Cir. 1975)], we nevertheless find the policy considerations underlying the application of the Relocation Act to a state highway project which seeks federal funding assistance to be similar to the policies underlying the application of NEPA to such projects.

of producing federal involvement." In this regard, the district court found that federal participation in the by-pass project was limited to the initial programming stage. We think the district court erred in this finding. Our review of the record indicates federal participation in the programming, location, design, preliminary engineering, and right of way acquisition stages. Hence, we have no difficulty in concluding on the basis of the record before us that the entire by-pass project is a "major federal action" within the meaning of 42 U. S. C. § 4332 (C) and that an EIS is required for the remaining three segments.

Inasmuch as the State of Indiana contends that under the circumstances of this case it may withdraw the project from federal funding participation, we are squarely faced with the troublesome question of whether by doing so at this late stage of the project, it is also relieved of its obligation to comply with NEPA. We are guided in this regard by the strong admonition of Congress contained in NEPA:

> "The Congress authorizes and directs that, to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA] . . .". 42 U. S. C. § 4332.

Given this expression of Congressional will, we are convinced that there is a point in the on-going federal-state relationship under Federal-Aid Highway Act programming at which the requirements of NEPA must be met. Under the facts and circumstances of this case, Indiana's seeking and receiving federal approval at various stages of the project and receiving preliminary financial benefits so imbued the highway project with a federal character that, notwithstanding the state's with-

drawal of the project from federal funding consideration, compliance with federal environmental statutes was necessary. Were we to hold otherwise, we would give little, if any, effect to the Congressional directive so cogently expressed by the phrase "to the fullest extent possible."

In the instant case, the record shows federal involvement up to and including right of way acquisition. The precise point at which a federally programmed state highway project becomes irrevocably federal in character for NEPA purposes is a decision we deem unnecessary to make since, for purposes of this case, we find the by-pass project sufficiently federal in character to require compliance with NEPA. We do not consider Indiana's act of withdrawal a crucial fact in the determination of whether or not the provisions of NEPA are applicable to the project in this case. Rather, we look to the history of federal-state involvement to determine if the project is a "major federal action" requiring NEPA compliance.

The State of Indiana has urged that preliminary federal-state dealings and its compliance with applicable federal statutes and regulations only present a possibility of federal funding, and by complying with federal requirements and receiving federal approval at various stages, the state preserves its option to seek federal funds for a project. Further, Indiana contends that a project becomes irrevocably federal in nature at the time of PS&E approval. We reject these contentions. If Indiana had not long ago sought federal funding for the by-pass project, had not programmed the project for federal assistance, sought and received federal approval of the location and design stages, received federal funds for preliminary engineering studies, and had not begun right-of-way acquisition, but rather had proceeded with these various phases of the project on its

own, the result in this case might have been different. See *Citizens For Balanced Environ. & Transp., Inc. v. Volpe*, 376 F. Supp. 806 (D.Conn. 1974), *aff'd. per curiam*, 503 F.2d 601 (2nd Cir. 1974).

Plaintiff also contends that if we do not find NEPA applicable to this case, the district court erred in refusing to decide the issue of whether the defendants had complied with Indiana environmental laws. (*Ind. Code* 13-1-10-1 *et seq.*). In light of our decision above, we need not address ourselves to this issue.

Accordingly, the judgment of the district court is vacated and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Campbell*

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
February 16, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

SCOTTSDALE MALL, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. IP 74-688-C
No. 76-1632 vs.	)	
STATE OF INDIANA, INDIANA STATE HIGHWAY COMMISSION, et al., *Defendants-Appellees.*	)	JAMES E. NOLAND, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED, with costs, and the cause REMANDED, in accordance with the opinion of this court filed this date.

* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
	)	
Plaintiff,	)	
vs.	)	**CAUSE NO. IP 74-688-C**
	)	
STATE OF INDIANA, et al,	)	
	)	
Defendants.	)	

JUDGMENT ENTRY

This cause of action came on for hearing and trial on February 5, 1976. By notification to the parties, the Court considered the defendants' motion to dismiss as a motion for summary judgment (Rule 12 and Rule 56, Federal Rules of Civil Procedure). Argument having been made by the parties, the Court thereupon overruled said motion and proceeded to trial on the issues as presented by the pleadings of the parties. The Court had previously entered a preliminary injunction on behalf of the plaintiff and against the defendant in connection with these proceedings on January 20, 1975.

On February 5 and 6, 1976, said cause of action was tried before the Court on the basis of the plaintiff's amended complaint in which the defendants were the State

of Indiana, Indiana State Highway Commission and the individual members of said Commission.

Whereupon the Court, having considered the evidence presented by the parties and the briefs submitted and arguments made by counsel and now being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED:

1. That the preliminary injunction heretofore issued by this Court on January 20, 1975, be, and the same is hereby, DISSOLVED.

2. That the Court now finds in favor of the defendants and against the plaintiff and that the plaintiff take nothing by its complaint.

3. That the costs of this action be taxed against the plaintiff.

DATED this 2nd day of April, 1976.

JAMES E. NOLAND, U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff herein is an Ohio limited partnership operating a shopping center complex in South Bend, Indiana, doing business as Scottsdale Mall. The defendants are the Indiana State Highway Commission (hereinafter ISHC) and its individual members acting for and on behalf of the State of Indiana. See, Ind. Code 1976 §§ 8-13-3-7, 8-13-5-8, 8-13-5-12.

The general subject of this controversy encompasses the projected development of the by-pass around the southeast quadrant of the South Bend-Elkhart metropolitan area (hereinafter East By-Pass). This highway improvement would traverse a path from existing U.S. 31 South of South Bend, at the point where an existing federally funded by-pass of the southwest quadrant of South Bend intersects U.S. 31 (hereinafter West By-Pass), to a point on existing U.S. 20 east of Elkhart. The principal dispute herein focuses on the center line of one segment of the East By-Pass which bisects plaintiff's property near the western terminus of the project at U.S. 31.

As presently planned, a 3.8 mile segment of the East By-Pass from U.S. 31 east to State Road 331 (hereinafter First Segment) would intersect and sever plaintiff's property thereby permanently removing five hundred ninety-nine (599) parking spaces and rendering inoperative expansion of the complex inherent in its design. On June 11, 1974, plaintiff attempted to avoid these consequences by offering to transfer to the defendants a 20 acre parcel of land south of Scottsdale Mall and to provide waivers of damage claims from the plaintiff, its mortgagor and tenants, if the defendants would agree to relocate the center line of First Segment so that it traversed the adjacent twenty acre tract. This proposal has been styled "Alternate B" by the parties herein. The plaintiff asserts the acquisition cost of its property under the original design of the First Segment would be $2.4 million, while Alternate B would result in a gift to the State of land valued by plaintiff at $600,000.

After considering various alternatives, the ISHC advised the plaintiff on December 5, 1974, of the defendant's intention to proceed with the First Segment of the East By-Pass as originally proposed. As of that date, the defendants had maintained their option to obtain federal highway funds for construction of the First Segment by programming this section of highway for such assistance as required by federal statute and regulations.

The plaintiff thens ought a permanent injunction in this Court prohibiting the defendants from taking further action in connection with the First Segment on the grounds that (1) ISHC had failed to comply with the National Environmental Policy Act 42 U.S.C. § 4321 *et seq.* (hereinafter NEPA) and the regulations issued pursuant thereto and had also failed to comply with the parallel state

environmental statute, see Ind. Code 13-1-10-1 *et seq.* and (2) ISHC by refusing to accept Alternate B acted in an arbitrary and capricious manner detrimental to the taxpayers of Indiana and the City of South Bend. On January 20, 1975, the Court issued a temporary injunction prohibiting the defendants from proceeding further in this matter and restraining plaintiff from making any capital improvements on its property pending a final determination of the issues before the Court.

The defendants subsequently decided to construct the East By-Pass without federal assistance and took steps to de-program this project from further federal consideration. As a result, the federal government was dismissed as a party defendant herein. This cause then came on for a hearing on the defendant's motion to dismiss; the motion was treated as one for summary judgment as authorized by Rule 12(c), Federal Rules of Civil Procedure.

After taking jurisdiction in this matter, the Court proceeded to hear evidence on two issues: First, whether the defendants were required to comply with NEPA and Indiana environmental laws before proceeding with construction on the First Segment and second, whether the defendants acted in an arbitrary and capricious manner by refusing to accept Alternate B.

BACKGROUND

Over twenty years ago ISHC initiated a study of projected highway use along U.S. 20 from a point east of the City of Elkhart to a point west of the City of South Bend. As a result, a four-lane limited access by-pass highway was conceived to alleviate anticipated congestion through the center of the Elkhart-South Bend metropolitan area. The west leg of the by-pass (West By-Pass) from

a point west of South Bend along U.S. 20 to a point south of the City along U.S. 31 has been completed.

The corridor for the aforementioned East By-Pass was established in 1967 after considerable public discussion regarding the general location of the proposed highway. Thereafter, two things occurred: First, private and public development in the area was undertaken with due notice of the proposed centerline of the East By-Pass and second, ISHC programmed segments of the East By-Pass, including the First Segment, for federal highway fund assistance.

In 1968 plaintiff purchased the site of the present Scottsdale Mall and proceeded to build the existing complex. Although plaintiff knew the highway corridor would bisect its property and thereby encroach upon future enlargement of the Mall, Scottsdale Mall was inherently designed for expansion. Four years later, the plaintiff acquired a twenty acre tract adjacent to its property ostensibly for the purpose of future expansion; however, these twenty acres eventually became the locus of the center-line of Alternate B and now stands in the vortex of this controversy.

JURISDICTION

Federal courts have been empowered by Congress to take original jurisdiction over cases arising under the Constitution, laws, or treaties of the United States, 28 U.S.C. § 1331. In determining whether the allegations herein are sufficient to invoke federal subject matter jurisdiction, the Court has employed the analysis commanded by the Supreme Court:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the . . . laws of the United States, the federal court . . . must entertain the suit. . . . The reason for this is that the court must assume

> jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief . . . .
>
> "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine the allegations . . . do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

The plaintiff contends ISHC has entwined the State with the federal government in the design of the First Segment of the East By-Pass so as to require an environmental impact statement (hereinafter EIS) approved by the Federal Highway Administration before construction begins. On the face of the complaint plaintiff has sufficiently invoked general federal jurisdiction requiring the Court to examine the pertinent parts of the National Environmental Policy Act and the Federal Aid Highway Act to determine whether the plaintiff is entitled to relief.

ELIGIBILITY FOR FEDERAL HIGHWAY ASSISTANCE

Throughout the voluminous record before the Court, plaintiff has advanced two principal arguments for the proposition that an EIS must be completed before construction can begin on the First Segment. Plaintiff relies fore-

most on the proposition that the First Segment is *de facto* a federal highway project and accordingly cannot be withdrawn from federal funding to avoid the full panoply of NEPA's commands. Alternatively, plaintiff contends the entire South Bend-Elkhart metropolitan area By-Pass is a federal project subject to NEPA because the West By-Pass was built with federal funds thereby prohibiting "segmenting" of the East By-Pass to avoid NEPA.

Before turning to the merits of the plaintiff's claims, the Court believes it would be helpful to examine how national policy designed to protect the environment interacts with the complexities of the federal highway aid program.

The National Environment Policy Act, 42 U.S.C. § 4321 *et seq.* embodies a declaration of Congressional policy requiring federal, state, and local governments to use all practical means, including financial assistance, to establish and maintain conditions wherein mankind and nature can exist without fear of mutual destruction. A key provision of NEPA directs the federal government to:

> "(c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action . . ." 42 U.S.C. § 4332.

Pursuant to NEPA the Federal Highway Aid Program 23 U.S.C. 101 *et seq.* requires each State Highway Agency in designing a highway project eligible for federal funds, 23 C.F.R § 771.4(a) to complete an EIS "during the location stage, prior to the selection of a particular location." 23 C.F.R. § 771.5(b). Thus, a State Highway Commission's

failure to complete an EIS as directed by Federal statute and regulation prohibits the Federal Highway Administration (hereinafter FHWA) from authorizing federal funds for any proposed highway construction.

A State Highway Commission preserves its eligibility for federal highway assistance by complying with each of the three phases of the Federal Highway Act. Successful completion of each stage of the application process is required before a state can timely request federal money from the FHWA; however, Congress has reserved to each state the right ultimately to determine for itself which projects shall be federally funded.

> "The authorization of the appropriation of federal funds or their availability for expenditure shall in no way infringe on the sovereign rights of the states to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted state program." 23 U.S.C. § 145.

During the first phase of the application process, a state designates a proposed highway project as falling into one of several highway systems, i.e., Federal Aid Primary, Federal Aid Secondary, Federal Aid Urban, or Federal Aid Interstate. 23 U.S.C. § 103. Thereafter a state may program a project for federal funds. 23 U.S.C. § 105. At this second stage, funds may be programmed for preliminary engineering studies, right-of-way-surveys, right-of-way acquisition, and actual construction.

Programming under § 105 is not a commitment by the federal government to provide federal funds for highway construction, nor is it an application by the state for a commitment of federal funds. Rather, § 105 programming is a budgeting mechanism of the federal government wherein each state earmarks its share of the annual Congres-

sional highway funding authorization, thereby reserving federal money for potential state use. *Movement Against Destruction (MAD) v. Volpe.* 361 F.Supp. 1360 (D.Md. 1973), *aff'd per curiam*, 500 F.2d 29 (4th Cir. 1974).

The final step and critical stage in a state's application for Federal Highway Aid funds occurs when a Highway Commission submits plans, specifications and estimates (hereinafter P.S.&E.) for approval by the Secretary of Transportation. 23 U.S.C. § 106(a). P.S.&E. approval followed by FHWA funding authorization is the point at which a proposed state highway project becomes irrevocably federal in nature, *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir. 1972); *Citizens For A Balanced Environment v. Volpe*, 376 F.Supp. 806 (Conn. 1974) *aff'd*, 503 F.2d 601 (2nd Cir. 1974); *Steubing v. Brinegar*, 375 F.Supp. 1158 (W.D. N.Y. 1974); *Movement Against Destruction (MAD) v. Volpe, supra*, and cannot be withdrawn from federal consideration simply to avoid NEPA. *San Antonio Conservation Society v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971).

NEPA

Under federal statutes and regulations, a state highway commission cannot receive federal funds for a major federal-state highway project unless all the procedural requirements of NEPA have been met. See 42 U.S.C. § 4332 and 23 C.F.R. § 771.5(b), *supra*. In order to enforce the EIS requirements of NEPA, a plaintiff has the burden of proving the proposed highway addition is a major federal project within the meaning of NEPA and the Federal Highway Aid Act. Judicial enforcement of the federal legislative scheme to control man's intrusion into nature cannot be obtained unless a plaintiff demonstrates the con-

tested highway project has been programmed for federal funding and subsequently approved by state and federal authorities for federal highway aid money. *City of Highland Park v. Train*, 519 F.2d 681, 694 (7th Cir. 1975).

The Court has closely examined the twenty eight exhibits plaintiff introduced into evidence at trial as well as the exhibits attached to the pleadings and has concluded the only federal participation in the East By-Pass occurred during the programming stage of the project's development. ISHC's involvement with the federal government was consistent with the legislative scheme designed to maintain a state's option to ultimately request federal highway funds. To this end the federal government expended $162,000 for preliminary engineering studies and right-of-way acquisition which ISHC repaid when it withdrew the East By-Pass from federal highway aid consideration. *See*, affidavit of George D. Gibson, Jr., Division Administrator, FHWA, December 30, 1975. The Court holds that an expenditure of $162,000 for preliminary engineering studies is *de minimus* federal involvement which does not render this highway project a major federal action subject to NEPA.

In reaching this conclusion the Court specifically rejects plaintiff's contention that completion of a majority of the steps depicted on ISHC's work flow chart for the First Segment (plaintiff's Exhibit 2), including location approval, demands characterization of this project as a major federal highway. Plaintiff's reliance on *La Raza Unida v. Volpe*, 488 F.2d 599 (9th Cir. 1973), *cert. denied* 417 U.S. 968, 94 S.Ct. 3171, 41 L.Ed.2d 1138 (1974) in support of its location theory as the point of federal involvement is misplaced. As the Seventh Circuit has pointed out, La Raza was decided under a federal relocation statute and does not control issues arising under NEPA

and the Federal Highway Aid statutes. *City of Highland Park v. Train, supra* at 695.

Under present federal law ISHC's failure to obtain an EIS at the location stage has closed the door to possible federal funding 23 C.F.R. § 771.5(e), a right reserved to each State Highway Commission. 23 U.S.C. § 145. It would be impractical for the federal government to expend human and financial resources to complete EIS studies on projects that cannot possibly receive federal funding. NEPA only applies to *major* federal highway projects and not *any* highway project; therefore, ISHC's decision not to comply with the eligibility procedures necessary to maintain their option to receive federal highway funds cannot have the paradoxical effect of producing federal involvement. *Citizens for a Balanced Environment v. Volpe, supra*, 376 F.Supp. at 813: *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611, 634 (E.D. Va. 1973), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16 (8th Cir. 1973).

The plaintiff's alternative theory for application of NEPA focuses on the assertion that the appropriate length of highway for an EIS in this case is the entire South Bend-Elkhart Metropolitan Area By-Pass. The plaintiff contends an EIS must cover the whole project because the West By-Pass was constructed with federal funds and ISHC's decision to build the East By-Pass with state funds results in an impermissible "segmenting" of a federal highway project to avoid federal environmental policy.

The Court does not dispute plaintiff's position that a state highway project authorized for federal participation by the Secretary of Transportation must comply with NEPA. NEPA does not apply, however, to projects approved and constructed before January 1, 1970, the effective date of the Act. *See, Investment Syndicates, Inc. v.*

Richmond, 318 F.Supp. 1038 (Or. 1970); *Brooks v. Volpe*, 319 F.Supp. 90 (W.D. Wash. 1970); *Pennsylvania Environment Council, Inc. v. Bartlett*, 315 F.Supp. 238 (M.D. Pa. 1970). *See also, Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975). Thus, the West By-Pass is not subject to consideration as a length of highway for EIS purposes.

The law is clear that as a partner to authorized federal participation in a highway project, a State cannot subvert national environmental policy by shifting federal funds from an authorized project to avoid the ramifications of NEPA's commands. *San Antonio Conservation Society v. Texas Highway Department, supra*, at 1027. In *San Antonio*, the Texas State Highway Department attempted to withdraw the middle segment of a highway project from federal consideration after the Secretary of Transportation *authorized* federal participation in construction of the two end segments of the project. Notwithstanding the plaintiff's arguments to the contrary, the rule laid down in *San Antonio* does not apply to the instant case because the Secretary of Transportation never authorized federal participation in construction of any segment of the East By-Pass. Furthermore, the Assistant Chief Engineer of the Highway Department, Mr. Walter Frick, testified that the project was not de-programmed for fear the proposed alignment of the First Segment could not withstand EIS scrutiny.

If ISHC wishes to re-open its option to request federal highway funds for the project contested herein, the FHWA has indicated the appropriate length of highway for EIS purposes encompasses the entire East By-Pass from a point on U.S. 31 south of South Bend to a point on U.S. 20 east of Elkhart. (Plaintiff's Exhibit 25). The Court believes this length of highway fully meets the standard set forth in federal regulations:

"(a) A highway section should be as long as practicable to permit consideration of environmental matters on a broad scope and meaningful evaluation of alternatives. A highway section may include, when appropriate, completed as well as uncompleted portions of the highway and one or more future highway projects. Piecemealing proposed highway improvements in separate EIS's is to be avoided. The highway section identified in the EIS or negative declaration should include the total length of highway between logical termini even though only a short length of the total identified highway section is proposed for construction or reconstruction within the multi-year work program." 23 C.F.R. 771.5(a)

The Court takes judicial notice of the existence of U.S. 31 and U.S. 20 as major national highways which qualify as logical termini for a By-Pass around a major metropolitan area. In addition, the East By-Pass meets the test raised by plaintiff that a highway section for an EIS be "as large as is feasible under present construction and financing practices and at least be *independently* supportable by meaningful terminal points." *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973) (emphasis added). The testimony of Walter Frick, George Gibson, and evidence introduced at trial (Plaintiff's Exhibit 18) all support the conclusion that the projected daily volume of traffic on the East By-Pass, 15,000 vehicles today and 30,000 in the year 1991, justifies a characterization of the project as one which has independent significance.

ARBITRARINESS

The real dispute in this cause is ISHC's failure to adopt Alternate B. Plaintiff has accused the defendants of acting in an arbitrary and capricious manner by rejecting the

plaintiff's proposal and deciding to begin construction on the First Segment as originally proposed.

The Court has concluded the East By-Pass has never been a federal highway project and therefore there is no issue before the Court regarding the reasonableness or arbitrariness of a federal administrator's action. *See, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 91 S.Ct. 814, 28 L.Ed. 2d 136 (1970); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975). The question remains, however, whether the Indiana State Highway Commission acted in an arbitrary and capricious manner by refusing to adopt Alternate B. The Court notes that the legislature of this state has charged ISHC with the responsibility of promoting the economic growth and welfare of Indiana through a vigorous and competent program of public highway development. Ind. Code 1976 § 8-13-1-2. ISHC has been granted the power of eminent domain to establish highway locations Ind. Code 1976 § 8-13-3-7; however, the exercise of said power is subject to court review. Ind. Code 1976 § 34-11-1-5.

Although courts may engage in the review of decisions concerning highway location, this Court does not have the authority to act as a "super" Department of Transportation which disregards the considerable expertise of a state highway commission and realigns highway corridors according to its own notion of fair play. On review of a highway placement, a federal court:

"... is not empowered to substitute its judgment for that of the state or federal highway authorities. Rather, the review is for the limited purpose of determining whether the responsible officials acted with a full good faith consideration of their legal obligations and whether the actual balance of costs and benefits strucks by the officials was arbitrary...." *Swain v. Brinegar*, 378 F.Supp. 753, 757-758 (S.D. Ill. 1974),

reversed on other grounds, 517 F.2d 766 (7th Cir. 1974).

Under the circumstances presented herein, ISHC's failure to rise to plaintiff's expectations regarding the attractiveness of Alternate B has not approached a level of action which can be characterized as arbitrary or capricious or contrary to law. While plaintiff may disagree with ISHC's decision to proceed with the First Segment, the facts of this case show that decision was the result of expert engineering studies and consideration of the alternatives by the ISHC staff.

In opting against realignment of the center-line of the First Segment, the defendant considered: The Annual rate of inflation for highway construction (38%); the user-benefit ratio of the proposed highway; the impact of impoundment of federal highway funds; the delays which would result from pursuing either the First Segment or Alternate B as a federally funded project; drainage and grade problems created by Alternate B; the costs of utility relocation and the delays attendant thereto; the cost of condemnation proceedings under Alternate B; the integrity and credibility of ISHC; and the delay which would result from redesign of the First Segment to accommodate Alternate B.

If the Indiana State Highway Commission had precipitously rejected the plaintiff's alternative without discussing the relative merits of the proposal, they could be said to have acted arbitrarily. On the other hand, however, it was the plaintiff and not the defendants who built Scottsdale Mall knowing it to be in the path of a proposed highway. The defendants did not exceed the bounds of reasonableness when they determined that additional delay and expense prohibited proceeding with Alternate B either as a state or federal highway project. The overwhelming

evidence before the Court demonstrates the defendants acted with utmost good faith throughout their deliberations and dispatched their duty to the people of Indiana with a constancy of effort.

For the reasons set forth hereinabove, the Court now DISSOLVES the preliminary injunction previously entered in this cause and the Court, after trial of the issues, now finds in favor of the defendants and against the plaintiff. The findings of fact and conclusions of law have not been specifically set forth but are included in the body of the above memorandum as provided by Rule 52, Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al	)	

AMENDED JUDGMENT ENTRY

This cause of action came on for hearing and trial on February 5, 1976. By notification to the parties, the Court considered the defendants' motion to dismiss as a motion for summary judgment (Rule 12 and Rule 56, Federal Rules' of Civil Procedure). Argument having been made by the parties, the Court thereupon overruled said motion and proceeded to trial on the issues as presented by the pleadings of the parties. The Court had previously entered a preliminary injunction on behalf of the plaintiff and against the defendant in connection with these proceedings on January 20, 1975.

On February 5 and 6, 1976, said cause of action was tried before the Court on the basis of the plaintiff's amended complaint in which the defendants were the State of Indiana, Indiana State Highway Commission and the individual members of said Commission.

On April 2, 1976, the Court entered its Judgment Entry and Memorandum Opinion in this cause. Thereafter plaintiffs filed a motion seeking to have this Court amend its Judgment Entry in order to clarify the Court's ruling and

thus make a determination as to whether further action is required from the defendants to meet the requirements of the Indiana Environmental Policy Act. The defendants responded to plaintiffs' motion and a further reply was then filed by plaintiffs herein.

Whereupon the Court, having considered the evidence presented by the parties and the briefs submitted and arguments made by counsel and now being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED:

1. That the preliminary injunction heretofore issued by this Court on January 20, 1975, be, and the same is hereby, DISSOLVED.

2. That the Court now finds in favor of the defendants and against the plaintiff and that the plaintiff take nothing by its complaint.

3. That the plaintiff has failed to sustain the burden of proof on the issue of whether the Indiana State Highway Commission (ISHC) has failed to comply with the State Environmental Policy Act, *Ind. Code* 13-1-10-1, *et seq.* Whereupon the Court now abstains from ruling on the state issue and the plaintiff's complaint is now DISMISSED.

This Entry is now made *nunc pro tunc* for April 2, 1976.

DATED this 3rd day of May, 1976.

JAMES E. NOLAND, U. S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SCOTTSDALE MALL, an Ohio Limited Partnership	)	
vs.	)	CAUSE NO. IP 74-688-C
STATE OF INDIANA, et al	)	

SUPPLEMENTAL MEMORANDUM

The Court now incorporates herein the findings of fact and conclusions of law as contained in the Memorandum Opinion of April 2, 1976, in this cause.

In the opinion of the Court, the evidence received in this cause of action demonstrates that the Indiana State Highway Commission (ISHC) has considered the environmental impact of the proposed highway project as shown by the prior proceedings herein. A federal environmental impact statement as to this project was previously filed. The filing of the federal EIS or its substantive content may constitute compliance with the Indiana Act.

However, the Court feels that it is unnecessary to decide the issue as to what compliance is required with the Indiana statute since that statute has not been litigated in the state courts.

This Court is now refraining from making any binding decision on this issue which would be considered *res judicata*. Instead the Court is now abstaining on the issue as to whether the Indiana State Highway Commission has complied with the requirements of what is sometimes re-

ferred to as the Indiana Environmental Protection Statute. Based on the proceedings heretofore in this cause, the Court believes ISHC has not been foreclosed from taking further action under this statute if such action is necessary and required. It is the opinion of this Court that such a determination should be made by the appropriate state agency or a state court.

In reaching its decision on the state environmental statute the Court has approved and followed the reasoning of Mr. Justice Clark in *San Antonio* where he stated:

> "The plaintiffs have suggested that Texas would still be bound by its own law . . . and that the Court below would have pendent jurisdiction to enforce this State statute. (citations omitted). There has been no development of this jurisdictional issue in that court. But assuming that the district court would have power to adjudicate this claim on such a jurisdictional basis, I believe it should exercise its discretion not to proceed on this wholly State cause of action and thus avoid a needless decision of State law. *See*, C. Wright, Law of Federal Courts, 62-65 (2d ed. 1970). The mere fact that State law parallels federal law, without more, is no reason to warrant a federal forum in adjudicating a contention that a State may be violating its own statute. Such litigation ought to be strictly the business of State courts." *San Antonio, supra*, at 1029. (Justice Clark concurring in part and dissenting in part.)

IT IS SO ORDERED.

APPENDIX C

STATUTORY PROVISIONS

42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given approrpiate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(ii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the

views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

23 U.S.C. § 103

(a) For the purposes of this title, the four Federal-aid systems, the primary system, the urban system, the secondary system, and the Interstate System, are established and continued pursuant to the provisions of this section.

(b) (1) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (f) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated, said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(2) After June 30, 1976, the Federal-aid primary system shall consist of an adequate system of connected main roads important to interstate, statewide, and regional travel, consisting of rural arterial routes and their extensions into or through urban areas. The Federal-aid primary system shall be designated by each State acting through its State highway department and where appropriate, shall be in accordance with the planning process pursuant to section 134 of this title, subject to the approval of the Secretary as provided by subsection (f) of this section.

(c) (1) The Federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (f) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, access roads to airports, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension pass through the urban area or connect with another Federal-aid system within the urban area.

(2) After June 30, 1976, the Federal-aid secondary system shall consist of rural major collector routes. The Federal-aid secondary system shall be designated by each State through its State highway department and appropriate local officials in cooperation with each other, subject to the approval of the Secretary as provided in subsection (f) of this section.

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(e) (1) The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate System of five hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System (including urban routes necessary for metropolitan trans-

portation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate System shall apply to all mileage designated under the third sentence of this paragraph, except that the cost to the United States of the aggregate of all mileage approval for which is withdrawn under the second sentence of this paragraph, as such cost is included in the 1972 Interstate System cost estimate set forth in House Public Works Committee Print Numbered 92-29, as revised in House Report Numbered 92-1443, increased or decreased, as the case may be, as determined by the Secretary, based on changes in construction costs of such route or portion thereof as of the date of withdrawal of approval under this paragraph and in accordance with that design of such route or portion thereof which is the basis of such 1972 cost estimate. In considering routes or portions thereof to be added to the Interstate System under the third sentence of this paragraph the Secretary shall in consultation with the States and local governments concerned, give preference, along with due regard for interstate highway type needs on a nationwide basis, to (A) routes or portions thereof in States in which the Secretary has heretofore or hereafter withdrawn his approval of other routes or portions thereof, and (B) the extension of routes which terminate within municipalities served by a single interstate route, so as

to provide traffic service entirely through such municipalities.

(3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

(4) Upon the joint request of a State Governor and the local governments concerned, the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within any urbanized area in that State selected and approved in accordance with this title prior to the enactment of this paragraph, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System or will no longer be essential by reason of the application of this paragraph and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. The milage of the route or portion thereof approval of which is withdrawn under this paragraph shall be available for designation on the Interstate System in any other State in accordance with paragraph (1) of this subsection. After the Secretary has withdrawn his approval of any such route or portion thereof, whenever responsible local officials of such urbanized area notify the State highway department that, in lieu of a route or portion thereof approval for which is withdrawn under this paragraph, their needs require a nonhighway public mass transit project involving the construction of fixed rail facilities, or the purchase of passenger equipment, including rolling

stock for any mode of mass transit, or both, and the State highway department determines that such public mass transit project is in accordance with the planning process under section 134 of this title and is entitled to priority under such planning process, such public mass transit project shall be submitted for approval to the Secretary. Approval of the plans, specifications, and estimates for such project by the Secretary shall be deemed a contractual obligation of the United States for payment out of the general funds in the Treasury of its proportional share of the cost of such project in an amount equal to the Federal share which would be paid for such a project under the Urban Mass Transportation Act of 1964, except that the total Federal cost of all such projects under this paragraph with respect to such route or portion thereof approval of which is withdrawn under this paragraph, shall not exceed the Federal share of the cost which would have been paid for such route or portion thereof, as such cost is included in the 1972 Interstate System cost estimate set forth in table 5 of House Public Works Committee Print Numbered 92-29, as revised in House Report Numbered 92-1443, increased or decreased, as the case may be, as determined by the Secretary, based on changes in construction costs of such route or portin thereof as of the date of withdrawal of approval under this paragraph and in accordance with that design of such route or portion thereof which is the basis of such 1972 cost estimate. Funds apportioned to such State for the Interstate System, which apportionment is based upon an Interstate System cost estimate that includes a route or portion thereof approval of which is withdrawn under this paragraph, shall be reduced by an amount equal to the Federal share of such project as such share becomes a contractual obligation of the United States. No general funds shall be obligated

under authority of this paragraph after June 30, 1981. No nonhighway public mass transit project shall be approved under this paragraph unless the Secretary has received assurances satisfactory to him from the State that public mass transportation systems will fully utilize the proposed project. The provision of assistance under this paragraph shall not be construed as bringing within the application of chapter 15 of title 5, United States Code, any nonsupervisory employee of an urban mass transportation system (or of any other agency or entity performing related functions) to whom such chapter is otherwise inapplicable. Funds available for expenditure to carry out the purposes of this paragraph shall be suppelmentary to and not in substitution for funds authorized and available for obligation pursuant to the Urban Mass Transportation Act of 1964 as amended. The provisions of section 3(e) (4) of the Urban Mass Transportation Act of 1964, as amended, shall apply in carrying out this paragraph.

(f) The Secretary shall have authority to approve in whole or in part the Federal-aid primary system, the Federal-aid secondary system, the Federal-aid urban system, and the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof. No Federal-aid system or portion thereof shall be eligible for projects in which Federal funds participate until approved by the Secretary.

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23 U.S.C. § 105(a)

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit

to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

23 U.S.C. § 106(a)

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

23 U.S.C. § 109

(a) The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to

accomplish the foregoing objectives and to conform to the particular needs of each locality.

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(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90 days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after the issuance of such guidelines.

(i) The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he determines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Protection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise levels for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

(j) The Secretary, after consultation with the Administrator of the Environmental Protection Agency, shall develop and promulgate guidelines to assure that highways constructed pursuant to this title are consistent with any approved plan for the implementation of any ambient air quality standard for any air quality control region designated pursuant to the Clean Air Act, as amended.

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23 U.S.C. § 110(a)

(a) As soon as practicable after the plans, specifications, and estimates for a specific project have been approved, the Secretary shall enter into a formal project agreement with the State highway department concerning the construction and maintenance of such project. Such project agreement shall make provision for State funds required for the State's pro rata share of the cost of construction of such project and for the maintenance thereof after completion of construction.

23 U.S.C. § 120(a)

(a) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project, financed with primary, secondary, or urban funds, on the Federal-aid primary system, the Federal-aid secondary system, and the Federal-aid urban system shall either (A) not exceed 70 per centum of the cost of construction, except that in the case of any State containing nontaxable Indian lands, individual and tribal, and public domain lands (both reserved and unreserved) exclusive of national forests and national parks and monuments, exceeding 5 per centum of the total area of all lands therein, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State, is of its total area, or (B) not exceed 70 per centum of the cost of construction, except that in the case of any State containing nontoaxable Indian lands, individual and tribal, public domain lands (both reserved and unreserved), national forests, and national parks and monuments, the Federal share shall be increased by a percentage of the remaining cost equal to the percentage that the area of all such lands in such State is of its total area, except that the Federal share

payable on any project in a State shall not exceed 95 per centum of the total cost of any such project. In any case where a State elects to have the Federal share provided in clause (B) of this subsection, the State must enter into an agreement with the Secretary covering a period of not less than one year, requiring such State to use solely for highway construction purposes (other than paying its share of projects approved under this title) during the period covered by such agreement the difference between the State's share as provided in clause (B) and what its share would be if it elected to pay the share provided in clause (A) for all projects subject to such agreement.

23 U.S.C. § 145

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.